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No. 09-1121

In the Supreme Court of the United States

J. MICHAEL BROWN, *et al.*,
Petitioners,

v.

ALICIA PEDREIRA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

The cross-petitioners are taxpayers who have challenged under the Establishment Clause a State's provision of state and federal funds to a private religious organization that uses those funds to support religious indoctrination. The Sixth Circuit held that the cross-petitioners have standing to proceed as state taxpayers but not as federal taxpayers. The court's holding regarding state-taxpayer standing is closely connected to its holding on federal-taxpayer standing, such that review of the former would affect the result on the latter issue. Therefore, if the Court grants the State's Petition on state-taxpayer standing, it should also grant certiorari on the following question:

Do federal taxpayers have standing to bring an as-applied challenge to a State's provision of federal funds to a proselytizing religious organization pursuant to federal programs authorized by specific congressional enactments, funded by specific congressional appropriations, and governed by a federal statute that promotes the payment of federal funds to religious organizations?

PARTIES

The defendant petitioners are J. Michael Brown, Secretary of the Commonwealth of Kentucky Justice and Public Safety Cabinet, in his official capacity; Janie P. Miller, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services, in her official capacity; and Kentucky Baptist Homes for Children, Inc., also known as Sunrise Children's Services.

The taxpayer-plaintiff cross-petitioners are Alicia Pedreira, Karen Vance, Paul Simmons, Johanna W.H. Van Wijk-Bos, and Elwood Sturtevant.

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INTRODUCTION

Kentucky Baptist Homes for Children is a residential childcare provider that cares for abused, neglected, and abandoned children whom the Commonwealth decides to place there. Pet. App. 87-88, ¶¶ 18, 21. Baptist Homes indoctrinates the children in its religious views, coerces them to take part in religious activity, and converts them to its version of Christianity. Pet. App. 90-91, 100-103, ¶¶ 26-27, 57-59. Kentucky pays Baptist Homes for the children's care with public dollars obtained from both state and federal taxpayers. Cross-Pet. App. 23a, ¶ 22.

The cross-petitioners challenged this arrangement, proceeding as both state and federal taxpayers. Pet. App. 86, ¶ 13. The court of appeals held that the cross-petitioners had standing as state taxpayers but not as federal taxpayers. Pet. App. 16-24. The court's decision on the state-taxpayer issue was based on two alternative holdings: (1) that state taxpayers need only show "a good-faith pocketbook injury" and need not meet the more demanding test for federal-taxpayer standing (Pet. App. 19 (quoting *Doremus* v. *Board of Education*, 342 U.S. 429, 434 (1952)); and (2) even if the more demanding test were to apply, the cross-petitioners met that test in their capacities as state taxpayers (Pet. App. 22-23). Although the questions presented in Kentucky's Petition attack only the first of these two holdings, the Court cannot — unless it wishes to engage in a purely academic exercise — grant certiorari on the

first holding without also addressing the second. Review of the second holding, however, would impact the court of appeals's ruling on federal-taxpayer standing. Therefore, if the Court grants Kentucky's Petition, it should also grant certiorari on whether the cross-petitioners have standing as federal taxpayers.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, entered on August 31, 2009, is reported at 579 F.3d 722 (6th Cir. 2009), and is reprinted in the defendant-petitioners' Appendix at 1-26. The decision of the United States District Court for the Western District of Kentucky, entered on March 31, 2008, is reported at 553 F. Supp. 2d 853 (W.D. Ky. 2008), and is reprinted in the defendant-petitioners' Appendix at 29-49.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its decision on August 31, 2009. Petitions for rehearing en banc by the Defendants were denied on December 16, 2009. A Petition for Certiorari by the Defendants was timely filed on March 16, 2010, and was docketed on March 18, 2010. The Court has jurisdiction over this Conditional Cross-Petition pursuant to 28 U.S.C. 1254(1) and Supreme Court Rule 12.5.

Pursuant to Supreme Court Rule 29(4)(b), this Conditional Cross-Petition is being served on the Solicitor General of the United States, as it presents the question whether the taxpayer cross-petitioners have standing to challenge "as applied" the constitutionality of certain Acts of Congress. No court below certified to the Attorney General that the

constitutionality of an Act of Congress was drawn into question.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The following federal statutes, set forth in relevant part in the Appendix hereto, are at issue in this Cross-Petition: 42 U.S.C. 604a, 670-679, 1381-1383f.

STATEMENT

Facts

The federal funds Kentucky pays to Baptist Homes come from two programs: the Social Security Act's Title IV-E program (42 U.S.C. 670-679), and the Supplemental Security Income ("SSI") program (42 U.S.C. 1381-1383f). See C.A. App. 377-385, 585.

Congress has regularly appropriated specific amounts of federal funds for these two programs. See Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, § 110(b)(4)-(5), 121 Stat. 10 (2007); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, 119 Stat. 2856, 2877 (2005).[1]

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[1] See also Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3132, 3135, 3160 (2004); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 246, 249, 274 (2004); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 317-18, 320, 341 (2003); Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-116, 115 Stat. 2194, 2197, 2215-16 (2002); Consolidated Appropriations — FY 2001, Pub. L. No. 106-554,

Moreover, Congress has enacted a detailed statutory scheme through which the two federal programs support private childcare. Statutes governing the Title IV-E program (1) explain that a purpose of the program is to enable the States to provide care for children, (2) require the federal government to make payments to the States of program funds based on certain formulas, and (3) specifically authorize States to make payments to and enter into contracts with private childcare providers. See 42 U.S.C. 670, 671(a)(10), 672(a)(1), 672(a)(2)(C), 672(b)(2), 672(c)(2), 674(a). Similarly, the statutes governing the SSI program (1) explain that a purpose of the program is to aid individuals with disabilities, (2) require payments to be made to aid eligible children pursuant to specific benefit formulas, and (3) contemplate that states will contract with private institutions that will, in turn, receive the SSI funds. See 42 U.S.C. 1381, 1382(e)(1)(E), 1382(e)(1)(G), 1382c(a)(1)(C), 1382e(e), 1383(a).

The Title IV-E and SSI programs are also covered by a "Charitable Choice" statute that calls for "States to contract with religious organizations * * * on the same basis as any other nongovernmental provider without impairing the religious character of such organizations * * *." 42 U.S.C. 604a(b).[2] The Charitable Choice statute

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114 Stat. 2763A-21, 2763A-24, 2763A-27 (2000); Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501A-232-33, 1501A-235, 1501A-271 (1999).

[2] The Charitable Choice statute, enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, applies to any program "established or modified

requires States and the federal government to allow religious entities to compete for covered funds on an equal basis with secular organizations. 42 U.S.C. 604a(c). The Charitable Choice statute also sets forth detailed requirements regulating state contracts with religious institutions. 42 U.S.C. 604a(d)-(j).

Proceedings

The cross-petitioners challenge the above-described federal appropriations and statutes as applied in this case. Cross-Pet. App. 24a-25a, ¶¶ 22, 66.[3] The district court concluded that the cross-petitioners lack standing as federal taxpayers, citing *Hein* v. *Freedom From Religion Foundation*, 551 U.S. 587 (2007), and summarily characterizing the federal appropriations and statutes as "wholly non-directive, general funding provisions." Pet. App. 48. The district court did not specifically address the

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under Title I or II of [the Act], that -- (i) permits contracts with organizations; or (ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance." Pub. L. No. 104-193, § 104(a)(2)(B), 110 Stat. 2162 (1996) (codified at 42 U.S.C. 604a(a)(2)(B)). Section 108(d) of the Act, which is part of the Act's Title I, modifies the Title IV-E program; and Title II of the Act (sections 200 through 232) modifies the SSI program. Pub. L. No. 104-193, §§ 108(d), 200-232, 110 Stat. 2166, 2185-98. As described above, the Title IV-E and SSI programs permit contracts with organizations and other disbursements to aid children.

[3] The cross-petitioners also challenge as applied the Kentucky appropriations and statutes that result in Baptist Homes's receipt of *state* funds. Cross-Pet. App. 23a-25a, ¶¶ 22, 66. That aspect of the case is addressed in the Petition and the Brief in Opposition (which is to be filed May 10, 2010).

Charitable Choice statute that mandates the provision of federal funds to religious providers.

The court of appeals affirmed on the federal-standing issue, concluding that the statutes authorizing the federal funding paid to Baptist Homes "are general funding provisions for childcare; they do not contemplate religious indoctrination." Pet. App. 18. The court stated that "the plaintiffs' claims are simply too attenuated to form a sufficient nexus between the legislation and the alleged violations." Pet. App. 18. Like the district court, the court of appeals simply did not address the Charitable Choice statute.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The Defendants' Petition contends that the Sixth Circuit erred by holding that the "legislative nexus" test applicable to federal taxpayers does not apply to state taxpayers. As the cross-petitioners will explain in detail in their Brief in Opposition, the Court would be engaging in a purely academic exercise if it were to grant the Petition without also addressing the Sixth Circuit's alternative holding that the cross-petitioners met the "legislative nexus" test in their capacities as state taxpayers. Treatment of that alternative holding would entail the Court providing guidance on the application of the "legislative nexus" test, guidance that would necessarily inform the propriety of the Sixth Circuit's ruling on whether the cross-petitioners have *federal*-taxpayer standing. Accordingly, if the Court grants the Petition and, in turn, reviews the Sixth Circuit's alternative holding regarding state-taxpayer standing, the Court should review the Sixth Circuit's ruling on federal-taxpayer standing too.

The federal-taxpayer-standing issue also independently meets the requirements for certiorari, because the Sixth Circuit's ruling on this question was inconsistent with this Court's precedents, including *Flast* v. *Cohen*, 392 U.S. 83 (1968), *Bowen* v. *Kendrick*, 487 U.S. 589, 618-622 (1988), and *Hein*, 551 U.S. 587.

I. The issue presented by the Cross-Petition is closely connected to the court of appeals's ruling on state-taxpayer standing.

If the Court were to grant the Defendants' request to address whether state taxpayers must meet the "legislative nexus" test, the Court would also need to address the Sixth Circuit's alternative holding that the cross-petitioners satisfied that test as state taxpayers. What the Court says on the latter matter would necessarily bear on whether the cross-petitioners have standing as federal taxpayers.

Indeed, arguments that the Defendants make in challenging the Sixth Circuit's alternative holding on state-taxpayer standing have direct relevance to the cross-petitioners' federal-taxpayer standing. For example, the Defendants have contended that the cross-petitioners lack standing as state taxpayers under the "legislative nexus" test because they allegedly fail to challenge any particular Kentucky statute or appropriation, the authorizing Kentucky statutes do not *require* the Commonwealth to contract with religious childcare institutions, and Kentucky's appropriations are purportedly insufficiently specific. *See* Petition 22-28.

While those arguments lack merit with respect to *state*-taxpayer standing (as will be explained in our opposition to the Defendants' Petition), the

arguments underscore the strength of the cross-petitioners' claim for standing as *federal* taxpayers. The cross-petitioners bring an "as applied" challenge to the federal statutes and appropriations that have resulted in the provision of federal funding for Baptist Homes's religious indoctrination of children. Cross-Pet. App. 24a-25a, ¶¶ 22, 66. The federal funding of Baptist Homes is governed by a Charitable Choice statute that expressly requires States to include religious institutions among the recipients of the funding. See 42 U.S.C. 604a(b)-(c). And Congress has annually passed appropriation acts designating specific sums of federal tax dollars for the particular federal programs through which Baptist Homes's proselytism of youths is financed. See p. 3 and note 1, *supra*.

If the Court holds that the cross-petitioners lack standing as state taxpayers, the cross-petitioners will be thrown out of court altogether unless they are allowed to proceed as federal taxpayers. Given the close connection between the state-standing and federal-standing questions in this case, as well as the strength of the cross-petitioners' federal-taxpayer standing, limiting the Court's review to the state-taxpayer-standing question would be manifestly unjust.

II. The court of appeals's ruling on federal-taxpayer standing is inconsistent with this Court's precedents.

The cross-petitioners plainly satisfy the requirements for federal-taxpayer standing set forth in *Flast*, 392 U.S. 83. The statute at issue in *Flast* — the Elementary and Secondary Education Act of 1965 — established programs to subsidize the education of low-income families. *Id.* at 86. Congress

appropriated a large sum of federal funds for these programs. *Id.* at 103 n.23. Under the Act, federal payments were made to state educational agencies, which passed the federal funds on to local educational agencies in the form of grants. *Id.* at 86. The Act required state and local agencies to ensure that children enrolled in private schools were included among the children who benefited from the Act's programs, but federal, state, and local officials were otherwise left with considerable discretion over how they implemented the Act. *Id.* at 86-87, 90 n.3. While the Act did not specifically reference religious schools, the Court explained in *Hein*, 551 U.S. at 604 n.3, that because most private schools at the time were religious, "Congress surely understood that much of the aid mandated by the statute would find its way to religious schools."

A group of federal taxpayers challenged the New York City Board of Education's implementation of the Act. *Flast*, 392 U.S. at 89-90. They contended that the Act did not authorize the aid the Board provided to religious schools, and that if the Act did, it was unconstitutional to that extent. *Id.* at 87, 89-90. The Court held that the taxpayers had standing: they had demonstrated a "legislative nexus" because the Act was passed under Congress's power "to spend for the general welfare, and the challenged program involve[d] a substantial expenditure of federal tax funds." *Id.* at 103.

In this case, the cross-petitioners have made a showing of a federal "legislative nexus" that is at least as strong. As in *Flast*, the challenged funding is paid pursuant to federal programs Congress enacted for particular purposes — here, childcare and aid to individuals with disabilities. 42 U.S.C. 670, 1381. As

in *Flast*, Congress has regularly appropriated large sums of money to fund the two programs. See p. 3 and note 1, *supra*. While in *Flast* the challenged funding was first paid to state agencies that in turn passed it on to local agencies to spend, here the federal funds are distributed at the state level instead of traveling down further to the municipal level. See C.A. App. 585; 42 U.S.C. 674(a). And while in *Flast* Congress merely required local officials to ensure that children in *private* schools would benefit from the challenged spending, without expressly referencing religious institutions, here Congress not only has authorized state officials to contract with private institutions for childcare (see 42 U.S.C. 672(a)(1), 672(a)(2)(C), 672(b)(2), 672(c)(2), 1382(e)(1)(E), 1382(e)(1)(G), 1382c(a)(1)(C), 1382e(e), 1383(a)), but has expressly required state officials to include *religious* institutions among the providers (42 U.S.C. 604a(b)-(c)).

The Sixth Circuit's conclusion on the federal-taxpayer question also conflicts with this Court's decision in *Bowen*, 487 U.S. 589. There, the Court held that a group of federal taxpayers had standing to challenge the awards of specific grants to certain religious institutions. *Id.* at 618-622. The grants were paid pursuant to a program established by Congress relating to teen sex and pregnancy. *Id.* at 593. The statute authorizing the program permitted but did not require grants to religious organizations. *Id.* at 604, 608. Rather, the recipients of the grants were selected through discretionary decisions made by federal executive-branch officials. *Id.* at 597, 619-620.

In this case, as in *Bowen*, the cross-petitioners challenge payments of federal funds to a particular

religious institution pursuant to specific programs established by Congress. As in *Bowen*, the recipients of the payments are determined through discretionary decisions of executive officials. What is more, unlike in *Bowen*, the discretion of the officials here is circumscribed by a federal statute that requires religious institutions to be included among the funding recipients.

The Sixth Circuit's conclusion concerning federal-taxpayer standing is also inconsistent with this Court's ruling in *Hein*, 551 U.S. 587. The Court held in *Hein* that a group of federal taxpayers lacked standing to challenge expenditures paid from general funds that executive-branch officials could use for any purpose and that were in fact used to support executive-branch speech and internal operations. See *id.* at 592, 595-596, 607-608. *Hein* reaffirmed that it is sufficient for a federal taxpayer to demonstrate that the challenged funding was "expressly authorized or mandated by any specific congressional enactment." See *id.* at 608 (plurality opinion). The spending challenged here not only is authorized by congressionally enacted and funded programs for the care of needy children, but the Charitable Choice statute actually requires religious institutions to be included among funding recipients. The expenditures — carried out with specific legislative appropriations under a detailed statutory scheme — are a far cry from *Hein*'s "purely discretionary Executive Branch expenditure." See *id.* at 615.

CONCLUSION

The legal questions raised by the panel's ruling on federal-taxpayer standing substantially overlap with those raised by the panel's alternative holding on state-taxpayer standing. It would be unjust to the

cross-petitioners to reverse the panel's holding on the latter without considering whether the former should accordingly also be reversed. And the panel's rejection of federal-taxpayer standing conflicts with this Court's precedents. For these reasons, if the Court grants the Defendants' Petition, it should also grant this Conditional Cross-Petition.

Respectfully submitted.

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APPENDIX

APPENDIX

42 U.S.C. 604a. Services provided by charitable, religious, or private organizations.

(a) In general

(1) State options

A State may--

(A) administer and provide services under the programs described in subparagraphs (A) and (B)(i) of paragraph (2) through contracts with charitable, religious, or private organizations; and

(B) provide beneficiaries of assistance under the programs described in subparagraphs (A) and (B)(ii) of paragraph (2) with certificates, vouchers, or other forms of disbursement which are redeemable with such organizations.

(2) Programs described

The programs described in this paragraph are the following programs:

(A) A State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. § 601 et seq.] (as amended by section 103(a) of this Act).

(B) Any other program established or modified under title I or II of this Act, that--

(i) permits contracts with organizations; or

(ii) permits certificates, vouchers, or other forms of disbursement to be provided

to beneficiaries, as a means of providing assistance.

(b) Religious organizations

The purpose of this section is to allow States to contract with religious organizations, or to allow religious organizations to accept certificates, vouchers, or other forms of disbursement under any program described in subsection (a)(2) of this section, on the same basis as any other nongovernmental provider without impairing the religious character of such organizations, and without diminishing the religious freedom of beneficiaries of assistance funded under such program.

(c) Nondiscrimination against religious organizations

In the event a State exercises its authority under subsection (a) of this section, religious organizations are eligible, on the same basis as any other private organization, as contractors to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, under any program described in subsection (a)(2) of this section so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution. Except as provided in subsection (k) of this section, neither the Federal Government nor a State receiving funds under such programs shall discriminate against an organization which is or applies to be a contractor to provide assistance, or which accepts certificates, vouchers, or other forms of disbursement, on the basis that the organization has a religious character.

(d) Religious character and freedom

(1) Religious organizations

A religious organization with a contract described in subsection (a)(1)(A) of this section, or which accepts certificates, vouchers, or other forms of disbursement under subsection (a)(1)(B) of this section, shall retain its independence from Federal, State, and local governments, including such organization's control over the definition, development, practice, and expression of its religious beliefs.

(2) Additional safeguards

Neither the Federal Government nor a State shall require a religious organization to--

(A) alter its form of internal governance; or

(B) remove religious art, icons, scripture, or other symbols;

in order to be eligible to contract to provide assistance, or to accept certificates, vouchers, or other forms of disbursement, funded under a program described in subsection (a)(2) of this section.

(e) Rights of beneficiaries of assistance

(1) In general

If an individual described in paragraph (2) has an objection to the religious character of the organization or institution from which the individual receives, or would receive, assistance funded under any program described in subsection (a)(2) of this section, the State in which the individual resides shall provide such individual (if otherwise eligible for such assistance) within a reasonable period of time

after the date of such objection with assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received from such organization.

(2) Individual described

An individual described in this paragraph is an individual who receives, applies for, or requests to apply for, assistance under a program described in subsection (a)(2) of this section.

(f) Employment practices

A religious organization's exemption provided under section 2000e-1 of this title regarding employment practices shall not be affected by its participation in, or receipt of funds from, programs described in subsection (a)(2) of this section.

(g) Nondiscrimination against beneficiaries

Except as otherwise provided in law, a religious organization shall not discriminate against an individual in regard to rendering assistance funded under any program described in subsection (a)(2) of this section on the basis of religion, a religious belief, or refusal to actively participate in a religious practice.

(h) Fiscal accountability

(1) In general

Except as provided in paragraph (2), any religious organization contracting to provide assistance funded under any program described in subsection (a)(2) of this section shall be subject to the same regulations as other contractors to

account in accord with generally accepted auditing principles for the use of such funds provided under such programs.

(2) Limited audit

If such organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit.

(i) Compliance

Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation.

(j) Limitations on use of funds for certain purposes

No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for sectarian worship, instruction, or proselytization.

(k) Preemption

Nothing in this section shall be construed to preempt any provision of a State constitution or State statute that prohibits or restricts the expenditure of State funds in or by religious organizations.

42 U.S.C. 670. Congressional declaration of purpose; authorization of appropriations.

For the purpose of enabling each State to provide, in appropriate cases, foster care and

transitional independent living programs for children who otherwise would have been eligible for assistance under the State's plan approved under part A of this subchapter (as such plan was in effect on June 1, 1995) and adoption assistance for children with special needs, there are authorized to be appropriated for each fiscal year (commencing with the fiscal year which begins October 1, 1980) such sums as may be necessary to carry out the provisions of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under this part.

42 U.S.C. 671. State plan for foster care and adoption assistance.

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which--

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by subpart 1 of part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

* * * * *

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part or part B of this subchapter, and provides that a waiver of any such standard may be made only on a case-by-case basis for non-safety standards . (as determined by the State) in relative foster family homes for specific children in care;

* * * * *

42 U.S.C. 672. Foster care maintenance payments program.

(a) In general

(1) Eligibility

Each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative specified in section 606(a) of this title (as in effect on July 16, 1996) into foster care if--

(A) the removal and foster care placement met, and the placement continues to meet, the requirements of paragraph (2); and

(B) the child, while in the home, would have met the AFDC eligibility requirement of paragraph (3).

(2) Removal and foster care placement requirements

The removal and foster care placement of a child meet the requirements of this paragraph if--

(A) the removal and foster care placement are in accordance with--

(i) a voluntary placement agreement entered into by a parent or legal guardian of the child who is the relative referred to in paragraph (1); or

(ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 671(a)(15) of this title for a child have been made;

(B) the child's placement and care are the responsibility of--

(i) the State agency administering the State plan approved under section 671 of this title;

(ii) any other public agency with which the State agency administering or supervising the administration of the State plan has made an agreement which is in effect;

(iii) an Indian tribe or a tribal organization (as defined in section 679c(a) of this title) or a tribal consortium that has a plan approved under section 671 of this title in accordance with section 679c of this title; and

(C) the child has been placed in a foster family home or child-care institution.

* * * * *

(b) Additional qualifications

Foster care maintenance payments may be made under this part only on behalf of a child described in subsection (a) of this section who is--

(1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or private child-placement or child-care agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term "foster care maintenance payments" (as defined in section 675(4) of this title).

(c) "Foster family home" and "child-care institution" defined

For the purposes of this part, (1) the term "foster family home" means a foster family home for children which is licensed by the State in which it is situated or has been approved, by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for

such licensing; and (2) the term "child-care institution" means a private child-care institution, or a public child-care institution which accommodates no more than twenty-five children, which is licensed by the State in which it is situated or has been approved, by the agency of such State responsible for licensing or approval of institutions of this type, as meeting the standards established for such licensing, but the term shall not include detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of children who are determined to be delinquent.

* * * * *

42 U.S.C. 674. Payments to States.

(a) Amounts

For each quarter beginning after September 30, 1980, each State which has a plan approved under this part shall be entitled to a payment equal to the sum of--

(1) an amount equal to the Federal medical assistance percentage (which shall be as defined in section 1396d(b) of this title, in the case of a State other than the District of Columbia, or 70 percent, in the case of the District of Columbia) of the total amount expended during such quarter as foster care maintenance payments under section 672 of this title for children in foster family homes or child-care institutions (or, with respect to such payments made during such quarter under a cooperative agreement or contract entered into by the State and an Indian tribe, tribal organization, or tribal consortium for the administration or payment of funds under this part, an amount equal to the Federal

medical assistance percentage that would apply under section 679c(d) of this title (in this paragraph referred to as the "tribal FMAP") if such Indian tribe, tribal organization, or tribal consortium made such payments under a program operated under that section, unless the tribal FMAP is less than the Federal medical assistance percentage that applies to the State); plus

* * * * *

42 U.S.C. 1381. Statement of purpose; authorization of appropriations.

For the purpose of establishing a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled, there are authorized to be appropriated sums sufficient to carry out this subchapter.

42 U.S.C. 1382. Eligibility for benefits.

* * * * *

(e) Limitation on eligibility of certain individuals

(1) (A) Except as provided in subparagraphs (B), (C), (D), (E), and (G), no person shall be an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if throughout such month he is an inmate of a public institution.

(B) In any case where an eligible individual or his eligible spouse (if any) is, throughout any month (subject to subparagraph (G)), in a medical treatment facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX of this

chapter, or an eligible individual is a child described in section 1382c(f)(2)(B) of this title, or, in the case of an eligible individual who is a child under the age of 18, receiving payments (with respect to such individual) under any health insurance policy issued by a private provider of such insurance the benefit under this subchapter for such individual for such month shall be payable (subject to subparagraph (E))--

(i) at a rate not in excess of $360 per year (reduced by the amount of any income not excluded pursuant to section 1382a(b) of this title) in the case of an individual who does not have an eligible spouse;

(ii) in the case of an individual who has an eligible spouse, if only one of them is in such a facility throughout such month, at a rate not in excess of the sum of--

(I) the rate of $360 per year (reduced by the amount of any income, not excluded pursuant to section 1382a(b) of this title, of the one who is in such facility), and

(II) the applicable rate specified in subsection (b)(1) of this section (reduced by the amount of any income, not excluded pursuant to section 1382a(b) of this title, of the other); and

(iii) at a rate not in excess of $720 per year (reduced by the amount of any income not excluded pursuant to section 1382a(b) of this title) in the case of an individual

who has an eligible spouse, if both of them are in such a facility throughout such month.

For purposes of this subsection, a medical treatment facility that provides services described in section 1396p(c)(1)(C) of this title shall be considered to be receiving payments with respect to an individual under a State plan approved under subchapter XIX of this chapter during any period of ineligibility of such individual provided for under the State plan pursuant to section 1396p(c) of this title.

* * * * *

(E) Notwithstanding subparagraphs (A) and (B), any individual who--

(i)(I) is an inmate of a public institution, the primary purpose of which is the provision of medical or psychiatric care, throughout any month as described in subparagraph (A), or

(II) is in a medical treatment facility throughout any month as described in subparagraph (B),

(ii) was eligible under section 1382h(a) or (b) of this title for the month preceding such month, and

(iii) under an agreement of the public institution or the medical treatment facility is permitted to retain any benefit payable by reason of this subparagraph, may be an eligible individual or eligible spouse for purposes of this subchapter (and

entitled to a benefit determined on the basis of the rate applicable under subsection (b) of this section) for the month referred to in subclause (I) or (II) of clause (i) and, if such subclause still applies, for the succeeding month.

* * * * *

(G) A person may be an eligible individual or eligible spouse for purposes of this subchapter, and subparagraphs (A) and (B) shall not apply, with respect to any particular month throughout which he or she is an inmate of a public institution the primary purpose of which is the provision of medical or psychiatric care, or is in a medical treatment facility receiving payments (with respect to such individual or spouse) under a State plan approved under subchapter XIX of this chapter or, in the case of an individual who is a child under the age of 18, under any health insurance policy issued by a private provider of such insurance, if it is determined in accordance with subparagraph (H) or (J) that--

(i) such person's stay in that institution or facility (or in that institution or facility and one or more other such institutions or facilities during a continuous period of institutionalization) is likely (as certified by a physician) not to exceed 3 months, and the particular month involved is one of the first 3 months throughout which such person is in such an institution or facility during a continuous period of institutionalization; and

(ii) such person needs to continue to maintain and provide for the expenses of the home or living arrangement to which he or she may return upon leaving the institution or facility.

The benefit of any person under this subchapter (including State supplementation if any) for each month to which this subparagraph applies shall be payable, without interruption of benefit payments and on the date the benefit involved is regularly due, at the rate that was applicable to such person in the month prior to the first month throughout which he or she is in the institution or facility.

* * * * *

42 U.S.C. 1382c. Definitions.

(a) (1) For purposes of this subchapter, the term "aged, blind, or disabled individual" means an individual who—

* * * * *

(C) (i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

* * * * *

42 U.S.C. 1382e. Supplementary assistance by State or subdivision to needy individuals.

* * * * *

(e) State standards; establishment; annual public review; annual certification; payments to individuals

(1) Each State shall establish or designate one or more State or local authorities which shall establish, maintain, and insure the enforcement of standards for any category of institutions, foster homes, or group living arrangements in which (as determined by the State) a significant number of recipients of supplemental security income benefits is residing or is likely to reside. Such standards shall be appropriate to the needs of such recipients and the character of the facilities involved, and shall govern such matters as admission policies, safety, sanitation, and protection of civil rights.

* * * * *

(4) Payments made under this subchapter with respect to an individual shall be reduced by an amount equal to the amount of any supplementary payment (as described in subsection (a) of this section) or other payment made by a State (or political subdivision thereof) which is made for or on account of any medical or any other type of remedial care provided by an institution of the type described in paragraph (1) to such individual as a resident or an inpatient of such institution if such institution is not approved as meeting the standards described in

such paragraph by the appropriate State or local authorities.

* * * * *

42 U.S.C. 1383. Procedure for payment of benefits.

(a) Time, manner, form, and duration of payments; representative payees; promulgation of regulations

(1) Benefits under this subchapter shall be paid at such time or times and (subject to paragraph (10)) in such installments as will best effectuate the purposes of this subchapter, as determined under regulations (and may in any case be paid less frequently than monthly where the amount of the monthly benefit would not exceed $10).

(2)(A)(i) Payments of the benefit of any individual may be made to any such individual or to the eligible spouse (if any) of such individual or partly to each.

(ii) (I) Upon a determination by the Commissioner of Social Security that the interest of such individual would be served thereby, such payments shall be made, regardless of the legal competency or incompetency of the individual or eligible spouse, to another individual, or an organization, with respect to whom the requirements of subparagraph (B) have been met (in this paragraph referred to as such individual's "representative payee") for the use and benefit of the individual or eligible spouse.

(II) In the case of an individual eligible for benefits under this subchapter by reason of disability, the payment of such benefits shall be made to a representative payee if the Commissioner of Social Security determines that such payment would serve the interest of the individual because the individual also has an alcoholism or drug addiction condition (as determined by the Commissioner) and the individual is incapable of managing such benefits.

* * * * *

(vii) In the case of an individual described in subparagraph (A)(ii)(II), when selecting such individual's representative payee, preference shall be given to--

(I) a certified community-based nonprofit social service agency (as defined in subparagraph (I));

(II) a Federal, State, or local government agency whose mission is to carry out income maintenance, social service, or health care-related activities;

(III) a State or local government agency with fiduciary responsibilities; or

(IV) a designee of an agency (other than of a Federal agency) referred to in the preceding subclauses of this clause, if the Commissioner of Social Security deems it appropriate,

unless the Commissioner of Social Security determines that selection of a family member would be appropriate.

* * * * *

Revised Continuing Appropriations Resolution, 2007, Pub. L. No. 110-5, § 110, 121 Stat. 10 (2007).

SEC. 110. (a) For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2006, and for activities under the Food Stamp Act of 1977, the levels established by section 101 shall be the amounts necessary to maintain program levels under current law.

(b) In addition to the amounts otherwise provided by section 101, the following amounts shall be available for the following accounts for advance payments for the first quarter of fiscal year 2008:

* * * * *

(4) "Department of Health and Human Services, Administration for Children and Families, Payments to States for Foster Care and Adoption Assistance," for payments to States or other non-Federal entities under title IV-E of the Social Security Act, $1,810,000,000.

(5) "Social Security Administration, Supplemental Security Income Program," for benefit payments under title XVI of the Social Security Act, $16,810,000,000, to remain available until expended.

Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, 119 Stat. 2856, 2877 (2005).

* * * * *

PAYMENTS TO STATES FOR FOSTER CARE AND ADOPTION ASSISTANCE

For making payments to States or other non-Federal entities under title IV-E of the Social Security Act, $4,852,800,000.

For making payments to States or other non-Federal entities under title IV-E of the Act, for the first quarter of fiscal year 2007, $1,730,000,000.

For making, after May 31 of the current fiscal year, payments to States or other non-Federal entities under section 474 of title IV-E, for the last 3 months of the current fiscal year for unanticipated costs, incurred for the current fiscal year, such sums as may be necessary.

* * * * *

SUPPLEMENTAL SECURITY INCOME PROGRAM

For carrying out titles XI and XVI of the Social Security Act, section 401 of Public Law 92-603, section 212 of Public Law 93-66, as amended, and section 405 of Public Law 95-216, including payment to the Social Security trust funds for administrative expenses incurred pursuant to section 201(g)(1) of the Social Security Act, $29,369,174,000, to remain available until expended: Provided, That any portion of the funds provided to a State in the current fiscal year and not obligated by the State during that year shall be returned to the Treasury.

For making, after June 15 of the current fiscal year, benefit payments to individuals under title XVI of the Social Security Act, for unanticipated costs incurred for the current fiscal year, such sums as may be necessary.

For making benefit payments under title XVI of the Social Security Act for the first quarter of fiscal year 2007, $11,110,000,000, to remain available until expended.

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ALICIA M. PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, ELWOOD STURTEVANT, BOB CUNNINGHAM, JANE DOE, AND JAMES DOE	)	
Plaintiffs	)	CIVIL ACTION NO. 3:00-CV-210-S
v.	)	**SECOND AMENDED COMPLAINT**
KENTUCKY BAPTIST HOMES FOR CHILDREN, INC., VIOLA MILLER, SECRETARY, CABINET FOR FAMILIES AND CHILDREN, AND ROBERT STEPHENS, SECRETARY, JUSTICE CABINET	)	
Defendants	)	

* * * * *

22. KBHC receives governments funds through contracts with Kentucky state government agencies, including the Cabinet for Families and Children and the Justice Cabinet's Department of Juvenile Justice. The Kentucky General Assembly has

authorized these two Kentucky agencies to distribute state funds through such contracts pursuant to its taxing and spending powers. Section 230 of the Kentucky Constitution provides that "[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law." The Kentucky Constitution gives the General Assembly the powers to tax and spend. *See* Ky. Const., §§ 36(1), 171. Pursuant to these powers, the General Assembly has provided that "[t]he [C]abinet [for Families and Children] or the Department of Juvenile Justice, as appropriate, is authorized and may pay for such care and treatment as it deems necessary for the well-being of any child committed to it, including medical expenses, room and board, clothing, and all other necessities for such children committed to its care and custody." Ky. Rev. Stat. Ann. § 200.115(1). The General Assembly has also authorized the Cabinet for Families and Children "to expend available funds to provide for the board, lodging, and care of children . . . who are placed by the cabinet in a foster home or boarding home." Ky. Rev. Stat. Ann. § 605.120(1). The General Assembly has in fact regularly appropriated funds to the Cabinet for Families and Children and the Department of Juvenile Justice. The funds provided by the Cabinet for Families and Children and the Department of Juvenile Justice to KBHC consist both of state funds obtained from Kentucky taxpayers and of federal funds obtained by the federal government from federal taxpayers and given by the federal government to the Commonwealth of Kentucky. The federal funds are paid pursuant to the Social Security Act's Title IV-E program, 42 U.S.C. §§ 670-79, and the Supplemental Security Income program, 42 U.S.C. §§ 1381-1383f. The

statutes governing these two programs authorize the states to make payments to and enter into contracts with private child-care providers. *See* 42 U.S.C. §§ 672(a)(1), 672(a)(2)(C), 672(b)(2), 672(c)(2), 1382(e)(1)(E), 1382(e)(1)(G), 1382c(a)(1)(C), 1382c(e)(1), 1383. Congress has regularly appropriated specific sums to fund the Title IV-E and Supplemental Security Income programs (these appropriation acts, as well as the appropriation acts by the Kentucky General Assembly that provided funds that were paid to KBHC, are described and cited in detail in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, filed in this action on August 28, 2007, and the exhibits cited therein; this Opposition and these exhibits are together incorporated by reference herein). The Title IV-E and Supplemental Security Income programs are also subject to the Charitable Choice provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193 § 104, 110 Stat. 2105 (codified at 42 U.S.C. § 604a), which expressly promotes the provision of federal funds to religious organizations, including pervasively sectarian ones.

* * * * *

66. Ky. Rev. Stat. Ann. § 200.115(1), Ky. Rev. Stat. Ann. § 605.120(1), 42 U.S.C. §§ 670-79 (including the particular provisions thereof cited in paragraph 22 above), 42 U.S.C. §§ 1381-1383f (including the particular provisions thereof cited in paragraph 22 above), and the appropriation acts by Congress and the Kentucky General Assembly that are referred to in paragraph 22 above are unconstitutional as applied. These statutes and appropriations acts violate the Establishment Clause

as applied in the context of the provision of Commonwealth and federal funds to KBHC because these statutes and appropriations acts authorize the provision of Commonwealth and federal funds to private child-care providers (such as KBHC) but lack any restrictions or safeguards against religious use of the funds or provision of the funds to pervasively religious entities. 42 U.S.C. § 604a is likewise unconstitutional as applied. This statute violates the Establishment Clause as applied in the context of the provision of Commonwealth and federal funds to KBHC because 42 U.S.C. § 604a promotes the provision of federal funds to religious organizations (such as KBHC) but lacks sufficient restrictions and enforcement mechanisms against religious use of the funds or provision of the funds to pervasively religious entities.

* * * * *